

STATE OF MICHIGAN
COURT OF APPEALS

GHASSAN M. SAAB,

Plaintiff/Counter-Defendant-
Appellee/Cross-Appellant,

v

ALICE FARAH,

Defendant/Counter-Plaintiff-
Appellant/Cross-Appellee.

UNPUBLISHED

October 2, 2008

No. 277475

Genesee Circuit Court

LC No. 04-079096-CK

GHASSAN M. SAAB,

Plaintiff/Counter-Defendant-
Appellant,

v

ALICE FARAH,

Defendant/Counter-Plaintiff-
Appellee.

No. 278287

Genesee Circuit Court

LC No. 04-079096-CK

GHASSAN M. SAAB,

Plaintiff/Counter-Defendant-
Appellee,

v

ALICE FARAH,

Defendant/Counter-Plaintiff-
Appellant.

No. 278384

Genesee Circuit Court

LC No. 04-079096-CK

GHASSAN M. SAAB,

Plaintiff/Counter-Defendant-
Appellee,

v

ALICE FARAH,

Defendant/Counter-Plaintiff-
Appellant.

No. 278772
Genesee Circuit Court
LC No. 04-079096-CK

Before: Schuette, P.J., and Zahra and Owens, JJ.

PER CURIAM.

In this divorce case, in Docket No. 277475, defendant Alice Farah appeals by leave granted from the trial court's denial of her motion to amend her countercomplaint. In Docket No. 278772, Farah appeals by leave granted from the trial court's order denying her motions for summary disposition of plaintiff Ghassan Saab's claims for breach of contract. In Docket Nos. 278384 and 278287, Farah and Saab cross-appeal by leave granted from the trial court's order granting partial summary disposition in favor of Saab. We affirm in part and reverse in part and remand.

I. Facts

The parties married in 1993 and were divorced pursuant to a consent judgment of divorce dated July 17, 2003. That judgment incorporated by reference the terms of a property settlement agreement (PSA) signed by the parties on July 16, 2003. The judgment specifically states that the terms of the PSA were not merged into the judgment of divorce. Paragraph 2.1 of the PSA, entitled "Mutual Release," states that "Subject to the provisions of this agreement, each party has released and discharged ... the other party of and from all causes of action, claims, rights, and demands whatsoever, in law or in equity, which either of the parties ever had or now has against the other, except any or all cause or causes of action for divorce." Paragraph 6.1(a) of the PSA states that the parties were forgoing formal discovery of each other's assets in the divorce proceedings, "agreeing instead to trust the other party to make a full and complete disclosure of the assets." Paragraph 6.1(b) states that each party acknowledges having made and received full and complete disclosure of all assets and that there were no additional assets that were not disclosed. Paragraph 6.13 of the agreement states:

6.13 Division of undisclosed property. By execution hereof the parties each acknowledge that there are no real or personal asset(s) which have not been disclosed. In the event either party should learn of an asset(s) which has not been disclosed, whether such disclosure is intentional or unintentional, then the circuit court entering the Judgment of Divorce shall have the authority to divide such asset(s) without regard to other terms of this agreement. (PSA §6.13).

While the PSA was not merged into the divorce judgment, the divorce judgment specifically states that the “court shall retain jurisdiction of this matter to enforce the executory terms of the [Property Settlement] Agreement” The last 2 paragraphs of the judgment of divorce state:

RELEASE OF ALL CLAIMS

This Judgment serves as a full and final release of all claims that each party has or may have against the other, whether based upon tort or contract, or any other chose in action. In addition, ***this Judgment shall serve as a bar to any claims each party may have against the other for any reason occurring up to the entry of this Judgment.***

RESOLUTION OF ISSUES

This Judgment resolves all existing and all pending claim[s] between the parties and, except as expressly herein set forth, this Judgment closes this judicial proceeding. (Judgment, Defendant’s Application, tab 5) (Emphasis added).

In May 2004 plaintiff filed suit against defendant alleging breach of the terms of the PSA based on defendant’s failure to turn over certain property. Plaintiff alleged claims for breach of contract and unjust enrichment and sought to rescind the PSA. Defendant filed a countercomplaint against plaintiff alleging several claims for breach of contract and fraud based on plaintiff’s misrepresentation of his income during the marriage.

II. Amendment of Countercomplaint to Add Breach of Trust and Confidence

Farah argues that the trial court erred in refusing to allow her to amend her countercomplaint to add allegations of breach of trust and confidence where the plain language of the PSA indicated that the parties had agreed to trust one another. We agree.

We review for an abuse of discretion the trial court's decision to grant or deny leave to amend the pleadings. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Under MCR 2.118(A)(2), leave to amend a pleading “shall be freely given when justice so requires.” A motion for leave to amend should ordinarily be granted absent “any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment.” *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000).

The trial court denied Farah’s motion to amend on the grounds that it was both untimely and futile. However, absent bad faith or actual prejudice to the opposing party, delay does not alone warrant denial of a motion to amend. *Weymers, supra* at 659.¹ The trial court also based

¹ Since rendering its decision on the amendment of the complaint, the trial court has reopened discovery on other issues rendering the delay a nonissue.

its ruling on its conclusion that Farah's motion was futile because Farah's own statements in her deposition showed that she did not trust Saab. The trial court erred in reaching this conclusion.

Section 6.1 of the PSA clearly states that "Each Party has been represented by separate legal counsel during the pendency of the Divorce Proceedings but each has requested their legal counsel not conduct formal Discovery into the assets of the other Party, **agreeing instead to trust the other Party to make a full and complete disclosure of the assets** [emphasis added]." Therefore, this issue is one of contract interpretation.

It is a well-settled principle of law that courts are bound by property settlements reached through negotiations and agreement by parties to a divorce action, in the absence of fraud, duress, mutual mistake, or severe stress which prevented a party from understanding in a reasonable manner the nature and effect of the act in which she was engaged. *Calo v Calo*, 143 Mich App 749, 753-754, 373 NW2d 207 (1985). When construing a contract, the first goal is to determine, and then enforce, the parties' intent based on the plain language of the agreement. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007). "If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce the language as written, unless the contract is contrary to law or public policy." *Id.* Courts may not rewrite plain and unambiguous language because parties must abide by the terms of their agreement. *Id.* at 130-131. Furthermore, appellate case law has established that, when not merged into the judgment, the underlying settlement agreement retains its separate identity as a contract, enforceable by resort to the "usual contract remedies." *Foreman v Foreman*, 266 Mich App 132, 141; 701 NW2d 167, 174 (2005). We find that the plain language of the contract indicates that the parties agreed to trust one another. The language is unambiguous and; therefore, the trial court should enforce the language as written and need not rely on any extraneous information when making a determination on the issue of trust.

In *Hyma v Lee*, 338 Mich 31, 39-40; 60 NW2d 920, 924 (1953) this Court stated:

'The rule that one has the right to rely on a full and truthful statement by a person bearing a confidential relation toward him is not, however, limited to relations held fiduciary as a matter of law, but applies wherever the circumstances induced one party to repose trust and confidence in the other, as where confidence is induced by the personal friendship of the parties. The rule is especially applicable if one party knows that the other is relying on him for a full and truthful statement of all facts, as where confidence is expressly reposed. [*Id.* at 39-40].

Here the parties created a relationship of trust through the plain language of a contract. Therefore, the trial court did err in using extrinsic evidence to evaluate the factual issue of whether Farah trusted Saab when the unambiguous language of the PSA plainly states that the parties agreed to trust each other. The language that Farah sought to add to her complaint would not render her claim futile because of the plain language in the PSA. Therefore, we reverse the trial court's denial of Farah's motion to amend her complaint.

III. Removal of the Term “Marital” from the Pleadings

Next, Farah argues that the trial court abused its discretion when it refused to allow Farah to amend her countercomplaint to remove the word “marital” from references to assets and property. We disagree.

It is not disputed that the parties negotiated and signed the PSA as a means of settling the property division in their divorce. The purpose of a property division is to equitably divide the assets of the marriage between the parties rather than those assets separately owned by the parties before the marriage. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Therefore, only marital assets are within the scope of this case and any claim to assets that would not be considered “marital” would be futile.

IV. Depleted and Undervalued Assets

Saab argues that the trial court erred in refusing to grant summary disposition of Farah’s counter-claims for equitable redistribution of depleted and undervalued marital assets in Saab’s favor pursuant to MCR 2.116(C)(7). We disagree.

We review de novo a trial court’s decision to grant or deny summary disposition under MCR 2.116(C)(7). *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001).

Count 8 of Farah’s countercomplaint seeks division of “undisclosed, undervalued, depleted, and concealed assets” pursuant to clause 6.13 of the PSA. The trial court concluded that the release, read in conjunction with clause 6.13 of the PSA, would allow Farah’s claims related to undervalued and depleted assets. Saab argued that these assets had already been disclosed, and as such were excluded by the release. The trial court rejected this argument, stating, “No; because I think if it’s undervalued, then the disclosure was not correct. Whether intentional or unintentional, as the language says.”

“We read contracts as a whole and accord their terms their plain and ordinary meaning.” *Scott v Farmers Ins Exch*, 266 Mich App 557, 561; 702 NW2d 681 (2005). “[U]nambiguous contracts ... are to be enforced as written unless a contractual provision violates law or public policy.” *Rory v Continental Ins Co*, 473 Mich 457, 491; 703 NW2d 23 (2005). A contractual word or phrase is not rendered ambiguous merely because the parties ascribe different meanings to it, see *Henderson v State Farm Fire and Cas Co*, 460 Mich 348, 354-355, 596 NW2d 190 (1999), or because it has more than one dictionary definition, *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 54, 723 NW2d 922 (2006).

Black’s Law Dictionary (6th ed) defines the word “disclose” as: “to bring into view by uncovering; to expose; to make known; to lay bare; to reveal to knowledge; to free from secrecy or ignorance, or make known.” Black’s defines “disclosure” as: the act of disclosing; revelation; the impartation of that which is secret or not fully understood. Based on these definitions, we conclude that only revealing part of an asset or undervaluing an asset would not render the asset “free from secrecy or ignorance.” If two constructions of a contract are possible and one reading renders the contract unfair or unjust, the Court will prefer the construction that is reasonable and

just. *Siegel Co v Codd*, 183 Mich 145, 153; 149 NW 1015 (1914). Therefore, the trial court did not err in refusing to grant summary disposition of Farah's counter-claims for equitable redistribution of depleted and undervalued marital assets in Saab's favor pursuant to MCR 2.116(C)(7).

V. Fraud/Misrepresentation Claim

Farah argues that the trial court erred in dismissing the fraud/misrepresentation claim in count VII of Farah's counter-complaint pursuant to MCR 2.116(C)(7). We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001).

Count VII of Farah's second amended counter-complaint is a claim for fraud/misrepresentation. The trial court ruled that the release paragraph contained in the judgment for divorce barred this claim. This release clause stated:

This Judgment serves as a full and final release of all claims that each Party has or may have against the other, whether based upon tort or contract, or any other chose in action. In addition, this Judgment shall serve as a bar to any claims each Party may have against the other for any reason occurring up to the Entry of this Judgment [Judgment of Divorce, 4].

Generally, the scope of a release is governed by the intent of the parties as expressed in the release; if the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release. *Rinke v Automotive Moulding Co*, 226 Mich App 432, 435; 573 NW2d 344 (1997). Initially, it appears that the language of the release should bar Farah's claim. However, case law makes a distinction in cases where a judgment of divorce and a PSA are incorporated, but not merged. In *Foreman, supra* this Court found that Michigan law recognizes an independent cause of action for fraud where the fraud induced entry into a settlement agreement that was incorporated, *but not merged*, into the final judgment of divorce. *Id.* at 136-137. "When a property settlement agreement is incorporated and merged in a divorce judgment, it becomes a disposition by the court of the property. But, when not merged in the divorce judgment, the property settlement agreement may only be enforced by resort to the usual contract remedies and not as part of the divorce judgment." *Grace v Grace*, 253 Mich App 357, 364-365, 655 NW2d 595 (2002)

Here, the claim of fraud is related to the PSA and not to the judgment of divorce into which it was incorporated but not merged. Therefore, Farah's remedies sound in contract and Farah's fraud claim is not barred by the release. *Grace, supra* at 364-365.

VI. Sanctions

Next, Farah argues that the trial court erred in refusing to award her sanctions based on her claim that Saab filed a vexatious or frivolous pleading or motion. We disagree.

The trial court never entered an order making a determination regarding whether sanctions were appropriate. Generally, an issue is not properly preserved if it is not raised before and addressed and decided by the trial court. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Therefore, we decline to address this unpreserved issue.

VII. Marital Assets

Next, Farah argues that the trial court erred when it ruled as a matter of law that the clear, unambiguous language of the agreement permitted redistribution only of the parties' marital assets, and that the trial court erred when it defined the scope of these assets in accordance with Michigan law. We disagree.

The de novo standard applies to issues of contract interpretation. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408, 646 NW2d 170 (2002).

Here the PSA did not include its own distinct definition of "marital assets" and the trial court correctly relied upon the standard legal definition as found in case law and statute. The purpose of interpreting a contract is to determine and enforce the intent of the parties. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 63 (2000) lv den 463 Mich 1013 (2001). A court must construe a contract in its entirety and attempt to apply the plain language of the agreement if possible. *Perry v Sied*, 461 Mich 680, 689; 611 NW2d 516 (2000); *Sobczak, supra*. Where contract terms have a definite legal meaning, parties to a contract are presumed to have intended that legal meaning unless a contrary definition appears in the contract. *In re Moukalled Estate*, 269 Mich App 708, 720-721; 714 NW2d 400 (2006); *Conagra, Inc v Farmers State Bank*, 237 Mich App 109; 602 NW2d 390 (1999). Therefore, Farah's assertion that the factfinder should be the one to interpret this term is incorrect because "marital assets" is a legal term with a definite legal meaning.

We find that the circuit court properly decided that the contractual term "marital assets" should be accorded its common meaning under Michigan statute and case law and that the PSA was meant to be limited to division of marital assets. The language of the contract does not contain any separate definition for the term "marital assets", nor does the text of the agreement suggest that the term "marital assets" should include the parties' separate, non-marital property. The parties negotiated and signed the PSA as a means of settling the property division in their divorce judgment. The purpose of such a property settlement agreement is to equitably divide the assets of the marriage between the parties rather than those assets which were separately owned by the parties before the marriage. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). This intent is expressly stated by the third paragraph of the "recitals" section at the beginning of the PSA, which states in relevant part:

3. The Parties ... confirm their separation, the existence of the divorce proceedings, and their desire to make arrangements in connection with the settlement of their property rights, spousal support and maintenance of each party, and other rights and obligations growing out of the marriage relationship and thereby avoiding the necessity of a trial in the divorce proceedings. (PSA p 1).

Farah has presented no contractual language negating this express intent or otherwise suggesting that the PSA was meant to encompass all assets owned by both parties rather than the assets of their marriage that needed to be divided in order to accomplish their divorce.

VIII. Summary Disposition of Saab's Breach of Contract Claim

Next, Farah argues that the trial court erred when it denied her motion for summary disposition of Saab's breach of contract claim pursuant to MCR 2.116(C)(10). We disagree.

We review a trial court's decision on a summary disposition motion de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

The record reflects that there is some evidence that both Saab and Farah misstated or undervalued assets. Thus, it appears that there remains a genuine issue of material fact as to whether both parties breached the contract simultaneously. When the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted. *White v Taylor Distributing Co*, 275 Mich App 615, 625; 739 NW2d 132 (2007).

IX. Saab's Allegation of Farah's Breach of Disclosure

Next, Farah argues that the trial court erred in failing to estop Saab from alleging that Farah breached her disclosure obligation where Saab prepared the document himself. We disagree.

Farah's argument is expressly precluded by the PSA. Section 8.8 states:

8.8 Construction of Agreement. Each party has reviewed and has had equal opportunity for input into this Agreement, including contributing requesting revisions in earlier drafts of this Agreement. *Neither party nor any legal counsel shall be construed to be the drafter or primary drafter of this Agreement* and in the event of any dispute regarding the construction of this Agreement or any of its provisions, ambiguities or question of interpretation shall not be construed more in favor of one party than the other; rather questions of interpretation shall be construed equally to each party (PSA 8.8) (Emphasis added).

Thus, the plain language of the PSA indicates that Farah cannot blame the misstatement of her assets on plaintiff. Parties may specifically agree that a contract should not be construed against its drafter; in fact, parties may agree to any terms they wish that are not otherwise prohibited by law. *DainlerChrysler v G-Tech Pro Staffing*, 260 Mich App 183, 187; 678 NW2d 647 (2003).

Therefore, Farah may not argue that because Saab prepared her schedule of assets, he should be estopped from arguing that Farah breached the contract based upon the inaccuracy of the document.

X. Simultaneous Breach of the PSA

Next, Farah argues that the trial court erred in concluding that Farah could have breached the PSA simultaneous with its signing based upon her failure to execute two quitclaim deeds. We agree. However, because this was but one of Saab's arguments in support of his breach of

contract claim against Farah, and other genuine issues of material fact remain regarding this issue, summary disposition under MCR 2.116(C)(10) was still inappropriate.

Farah is correct in arguing that her failure to execute the two deeds in question could not have constituted a breach of the PSA simultaneous with its signing. Testimony of her attorney indicates that the deeds were not available at the time the parties executed the PSA. The execution was an executory obligation and could not possibly constitute an immediate breach of the PSA by Farah. *See Stodard v Manufacturers Nat Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999). However, a genuine issue of material fact remains as to whether Farah breached the PSA when she signed it based upon her alleged incomplete assets disclosure. Further, Farah did fail to execute the deeds in question, which indicates that an issue of fact remains as to whether she did indeed breach the PSA, just not contemporaneously with its signing. Therefore, the trial court did not err in denying Farah's motion for summary disposition on this issue where genuine issues of material fact remain as to Saab's breach of contract claim against Farah.

XI. Saab's Breach of Contract Claim

Finally, Farah argues that the trial court erred when it denied her motion for summary disposition on the basis of her failure to execute the deeds. We disagree.

Farah argues that Saab's breach of contract claim must fail because Saab failed to establish damages. While it is true that Saab did not seek monetary damages, it is well-established that the remedy for breach of contract can include money damages, injunctive relief, or both. *Cramer v Metropolitan Savings*, 401 Mich 252, 261; 258 NW2d 20 (1977), cert den 436 US 958 (1978). By failing to execute the deeds Farah could have damaged plaintiff by denying him complete title and possession of property that rightfully belonged to him. Depriving Saab of his property can certainly be construed as damages, which would warrant either injunctive relief, or an award of monetary damages. Thus, whether Saab actually suffered damages remains an issue of fact and the trial court did not err in denying Farah's motion for summary disposition on this matter.

Affirmed in part, reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Brian K. Zahra
/s/ Donald S. Owens